FILED
JUN 30 2003
OFFICE OF THE CLERK

No. 02-1369

In The Supreme Court Of The United States

BETTY MITCHELL, Warden, *Petitioner*,
v.

GREGORY ESPARZA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

In the opening brief, petitioner demonstrated that the Sixth Circuit opinion below created sharp conflicts on two vitally important and frequently recurring issues arising in federal habeas: (1) The standard of review the Sixth Circuit used—simply substituting its own judgment for that of the state courts—directly conflicts with the language of AEDPA, this Court's jurisprudence under that statute, and courts in seven other circuits; and, (2) The Sixth Circuit's decision that the alleged Eighth Amendment violation at issue below—*i.e.*, Ohio's alleged failure to follow its capital sentencing statutes—is a "structural error," and thus not subject to harmless error analysis, directly conflicts with decisions from both the Eighth and Ninth Circuits. In response, Esparza challenges neither the existence of these conflicts, nor their importance, thereby tacitly agreeing that this case merits review. And, as described below (*see* Sec. I), events occurring since the petition was filed, including a recent opinion from this Court, demonstrate even more compellingly the need for immediate review and correction here.

Having elected not to dispute the cited conflicts, Esparza instead focuses on the merits, endeavoring to show that the Sixth Circuit did not err. Esparza's efforts here, however, are unconvincing. With regard to the Sixth Circuit's failure to apply the AEDPA-mandated standard of review, Esparza makes two arguments:

- His first—that because the state courts allegedly failed to address his Eighth Amendment claim in sufficient detail, the Sixth Circuit was not required to apply AEDPA deference, *see* Resp. Br. at 8-10—simply misstates the facts. The state courts fully adjudicated Esparza's claim on the merits not only once, but twice, and, on each occasion they concluded that the sentence was lawful. *See* Pet. at 7-8, citing Appendix. Under AEDPA, the

Sixth Circuit was not free to merely substitute its own judgment for that of the state courts, and yet that is precisely what it did.

- His second—that the Sixth Circuit *did* undertake an AEDPA review, *see* Resp. Br. at 10-12—is wrong as well. The Sixth Circuit never even mentioned the AEDPA standard of review, and the court's efforts to stitch together a dissent from one case, a concurrence from another, and the opinion from yet a third, to glean a never before seen proposition of federal law obviously fail to comport with AEDPA's mandate limiting review to "*clearly established* federal law."

In response to petitioner's challenge to the Sixth Circuit's treatment of the alleged Eighth Amendment violation as "structural error," Esparza does little to defend the court's decision. He merely quotes the lower court's own errant conclusion that using a harmless error standard "would lead to the conclusion that any, or all, elements required by the state's capital sentencing systems may be supplied by judges rather than the jury." That is simply not true. As the Ohio Supreme Court held, it was the jury, not the judge, who found the aggravating factor here. Thus, even if the Eighth Amendment required jury sentencing, such concerns are not raised here, and, in any event, harmless error should apply.

At bottom, Esparza's claim is that his death sentence resulted from a misapplication of state law, and thus violates his Eighth Amendment rights. *See* Resp. Br. at 5-6. Even putting aside the question of AEDPA deference, however, this claim fails for the simple reason that Ohio courts have already adjudicated his state law claim, and they uniformly held that his death sentence did not, in fact, violate state law.

In short, Esparza's brief tacitly admits the need for immediate review, and confirms the need for reversal. The

Sixth Circuit blatantly transgressed AEDPA's mandates, and thereby interjected substantial conflict and confusion into this already complex area of the law. Petitioner respectfully urges the Court to accept this case, and correct the lower court's misapplication of federal habeas law.

ARGUMENT IN RESPONSE

I. Recent Events Confirm The Need To Grant Certiorari To Correct The Judgment Below.

The petition articulates several reasons why this case merits review and correction; two events that have occurred since the petition was filed, however, provide yet additional support for petitioner's request. First, this Court's recent opinion in *Price v. Vincent*, 538 U.S. __, 155 L. Ed.2d 877 (2003), unanimously recognized the need to correct the Sixth Circuit where the court below had "recited [the proper] standard but then forgot to apply it". Here, the Sixth Circuit committed an even more egregious error; it did not even bother to recite the standard, let alone apply it. Instead, the court below chose, as the dissent noted, to "basically sideline" AEDPA, *Esparza v. Mitchell*, 310 F.3d 414, 425 (6th Cir. 2002)—the very type of fundamental error in habeas analysis that recently led this Court to summarily reverse two Ninth Circuit decisions. *See Woodford v. Visciotti*, 537 U.S. 19, 123 S.Ct. 357, 360 (2002); *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362 (2002). This Court has repeatedly recognized the need to ensure that lower courts are faithfully implementing AEDPA's basic habeas framework—the court below here failed to do so.

Second, with regard to the Sixth Circuit's holding on "structural error," other courts are already beginning to recognize that this holding directly conflicts with an emerging consensus about the meaning of *Apprendi* and *Ring*. *See Arizona v. Ring*, 65 P.3d 915, 935 and n.20 (Ariz.

2003)" (describing consensus that *Apprendi* error is susceptible to harmless error analysis, but noting that the Sixth Circuit disagrees). The other circuits to consider the issue, relying on a Sixth Amendment analysis, have concluded that *Apprendi* error can be harmless. *Id.* (citing cases). The decision below, however, relying on the Eighth Amendment, concludes that it cannot. Guidance from this Court is essential to resolve this crucial issue.

II. Because It Did Not, And Could Not, Find That The State Court Decision Below Was Contrary To, Or An Unreasonable Application Of, Settled Federal Law, The Sixth Circuit's Decision Violates AEDPA And Must Be Reversed.

In an attempt to defend the Sixth Circuit's failure to properly apply AEDPA, Esparza mischaracterizes petitioner's argument. Esparza asserts that the State of Ohio expects "federal courts to blindly agree to the [state court's] outcome" (*see* Resp. Brief at 9)—that is simply not true. The State of Ohio merely expects that the Sixth Circuit will adhere to AEDPA's language, and this Court's jurisprudence, in analyzing habeas claims; the court below failed to do so.

It bears repeating that, under AEDPA, the question a federal court faces on habeas review is not whether the state court erred in its criminal adjudication; rather, once a state court has adjudicated an issue on the merits, the sole question is whether the state court's decision reflects a result that is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1). *Early*, 537 U.S. 3, 123 S.Ct. at 363.

In the face of § 2254(d)(1)'s clear language, Respondent offers two separate (and somewhat inconsistent) arguments supporting his view that the court below did, in

fact, apply AEDPA: (1) that the court did not need to use AEDPA standards because, although Esparza presented his Eighth Amendment claim to state courts, those courts "did not address" that violation (Resp. Br. at 9), and (2) that, notwithstanding its failure to cite AEDPA standards, the court was in fact using them (Resp. Br. at 11-12). Neither of these contentions, however, survives scrutiny.

A. Ohio State Courts Adjudicated Esparza's Claim On The Merits, And Thus AEDPA's Review Standards Apply.

Implicitly conceding that the panel majority failed to constrain itself to the limited review AEDPA allows, Esparza asserts that there was no state court adjudication on his Eighth Amendment claim, and thus the court below was free to "address the claim without reference to AEDPA's standards." Resp. Br. at 9. He is wrong.

Esparza admits that he "clearly presented" his Eighth Amendment claim to the state courts. Resp. Br. at 8. And he further concedes that this claim was entirely premised on supposed errors of state law. *Id.* at 6. The record is clear, however, that the state courts considered, and rejected, that claim. *See* Pet. at 7-8, citing Appendix. On two separate occasions, the Ohio courts concluded, after explaining their reasoning, that the indictment was sufficient under state law. *Id.* These decisions clearly constitute "adjudications on the merits" for AEDPA purposes. *Early*, 537 U.S. 3, 123 S.Ct. at 364. While the Ohio courts may not have cited Eighth Amendment cases, there is no requirement that they do so. As this Court itself has recently noted, even if the state court "failed to apply" the clearly established law of this Court in adjudicating the claims, that failure would not justify habeas relief. *Id.* at 365. Rather, habeas relief is appropriate *only if* the petitioner meets the "more demanding requirement" of showing that the state court adjudication was "contrary to" or

an "unreasonable application of" such law. *Id.* at 366. Neither Esparza, nor the Sixth Circuit, made any such showing here.

B. The Sixth Circuit Did Not Apply AEDPA's Limited Scope Of Review.

Despite the panel majority's failure to even mention AEDPA, much less apply it, Esparza still argues that the panel majority and the district court did, in fact, review the state court decision using AEDPA standards. Resp. Br. at 9. The lower courts' opinions, however, belie his argument.

At least in *Price*, 538 U.S. __, 155 L. Ed.2d at 885, the Sixth Circuit "recited [the proper] standard," before neglecting to apply it. Here, Esparza is unable to point to a single passage from the Sixth Circuit opinion in which the court determines that a state court adjudication was either "contrary to," or "an unreasonable application of" "clearly established federal law" as set forth by this Court's decisions. Indeed, the Sixth Circuit did not even attempt to articulate what constituted the requisite "clearly established federal law" at the time Esparza's conviction became final, the only time that matters for purposes of review under AEDPA. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000) (review on habeas limited to federal law that is "clearly established at the time the state-court conviction became final").

Perhaps recognizing this failure, Esparza attempts to bolster the Sixth Circuit's decision by reference to the district court. His efforts here fail as well. While the district court at least genuflected to the AEDPA standard—a step beyond the Sixth Circuit's complete failure to even mention AEDPA—it did not find that the state courts' decisions contravened or unreasonably applied the Supreme Court's Eighth Amendment cases. On the contrary, the district court determined that the state courts' failure to grant relief "ran

afoul" of *Apprendi v. New Jersey*—a *Sixth Amendment* case decided eight years after the state appellate court's review. In fact, in finding an Eighth Amendment "error," the district court relied almost exclusively upon cases decided years after Esparza's conviction became final in 1988. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Neder v. United States*, 527 U.S. 1 (1999); *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Gaudin*, 515 U.S. 506 (1995).

Neither the Sixth Circuit panel nor the district court applied appropriate AEDPA standards in reviewing Esparza's state court convictions. Accordingly, petitioner respectfully urges this Court to grant jurisdiction and reverse.

III. Failing To Include "Principal Offender" Language In An Indictment Does Not Violate The Eighth Amendment.

As Esparza's response makes clear, his Eighth Amendment claim is predicated solely on his assertion that his capital sentence violates state law. Resp. Br. at 5-6. The Ohio Supreme Court, however, has reviewed his claim, and concluded that no such violation occurred. Because the Ohio Supreme Court is the final authority on the meaning of Ohio law, its conclusion in this regard is dispositive. Accordingly, independent of the appropriate standard of review, Esparaza's Eighth Amendment claim must fail.

Esparza argues that, because the indictment and jury instructions lacked "principal offender" language, he was tried for a non-capital crime, but punished for a capital crime—in violation of the Eighth Amendment's narrowing requirement. Resp. Br. at 8 (citing *Esparza*, 310 F.3d at 419, n.1). This Court, however, has repeatedly recognized that purposefully killing another during an aggravated robbery is sufficient in itself to satisfy the Eighth Amendment's

"narrowing" requirement. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). Thus, to the extent that Ohio further narrows the class by limiting death penalty eligibility to only those felony murderers who were the "principal offenders" or who acted with "prior calculation and design," *see* OHIO REV. CODE § 2929.04(A)(7) (Baldwin 2003), such limitation is purely a matter of state law.

Esparza thus misses the point when he notes that the state court opinion "did not address the Eighth Amendment violation and focused only on the court's perception of Ohio law." Resp. Br. at 9. The state court "focused only on" state law *precisely because* the court recognized that absent a state law error, there could be no Eighth Amendment violation. And, the state court's conclusion that no state law error occurred thus ended the need for any further inquiry.

Esparza's argument that the Sixth Circuit's decision "merely requires the State of Ohio to follow the mandates of its own statute" is similarly flawed. Resp. Br. at 6. The Ohio Supreme Court is the final arbiter of what Ohio's "own statutes" require, and that court has held that the failure to include "principal offender" language in the indictment or jury instructions is not reversible error where there was no evidence that the murder was committed by more than one person, and, therefore, the defendant "was either the principal offender, or he committed no offense at all." *State v. Bonnell*, 61 Ohio St.3d 179, 184 (1991).

Under *Bonnell*, Esparza's capital sentence here clearly did not violate state law. The case was tried on the theory that Esparza was the sole perpetrator, and thus the jury necessarily concluded he was the principal offender (*i.e.*, the person who shot and killed Melanie Gerschultz). While Esparza makes much of certain allegedly "exculpatory" evidence, none of that evidence in any way disputes that he was the shooter. Thus, if the Ohio Supreme Court's view on

the meaning of Ohio's statutes is accepted—as it must be in federal habeas corpus proceedings—"the constitutional violation found by the [panel majority] dissolves." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983). The panel majority's finding of *constitutional* error then, based on its determination that the state courts misapplied Ohio's sentencing law, is clearly erroneous and should be reversed.

IV. The Sixth Circuit Erred By Treating The Alleged Error As "Structural."

The Sixth Circuit erred in finding an Eighth Amendment violation to begin with, but erred even more egregiously by holding that the violation amounted to "structural error." As the dissent below correctly noted, this Court has never held that a trial error of the type at issue here is structural error, *Esparza*, 310 F.3d at 429 (Suhrheinrich, J., dissenting), and Esparza fails to cite any case law throwing that observation into doubt.

Esparza's claim that using harmless error analysis here would "undercut the very meaning of due process" is absurd. *See* Resp. Br. at 6. Here, the indictment provided Esparza with abundant notice of the capital charge. Moreover, the Ohio appellate court found that the indictment contained a valid capital specification under Ohio law (noting that the words "capital specification as to the first count" appeared on the front of the indictment), and neither the district court, nor the panel majority found this determination to be unreasonable.

Esparza's reliance on the Sixth Circuit's errant assertions that the Eighth Amendment requires "jury sentencing" in capital cases, and that, under the State's reasoning, all "elements required by the state's capital sentencing system may be supplied by judges rather than the jury" similarly fails to advance his argument. Resp. Br. at 7.

With regard to the former, this Court has never recognized an Eighth Amendment right to jury sentencing. With regard to the latter, it was the jury here, not the judge, who found the aggravating factor. Because the case was tried on a theory that Esparza was the sole perpetrator, the jury verdict was the "functional equivalent" of a finding that he was the "principal offender," and thus harmless error review was appropriate. *See California v. Roy*, 519 U.S. 2, 6 (1996) (Scalia, J., concurring).

Esparza's citations to *Presnell v. Georgia*, 439 U.S. 14 (1978) and *Cole v. Arkansas*, 333 U.S. 196 (1948), *see* Resp. Br. at 9, are similarly misplaced. Neither of these cases even mentions structural error, and, in any event, *each actually supports petitioner's argument that no Eighth Amendment violation occurred. Cole*, for instance, states that "to conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." 333 U.S. at 202. *See also Presnell*, 439 U.S. at 16 (same). Esparza's case, however, was tried exclusively on the theory that he was the sole perpetrator. Thus, appraising his conviction in light of "the case as it was tried," and the "issues [as they] were determined in the trial court" demonstrates its validity.

In sum, as the dissent below noted, this Court has a short list of "structural errors," and the error here is not on it. *Esparza*, 310 F.3d at 429 (Suhrheinrich, J., dissenting). The Sixth Circuit's unwarranted expansion of that list merits immediate attention from this Court.

CONCLUSION

For all of these reasons, as well as those in its Petition, Petitioner respectfully urges the Court to grant Certiorari and reverse the decision below.

Respectfully submitted,

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